LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
AUG 13 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 414

HUGH C. FISHER,

Petitioner

V.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Hugh C. Fisher
Petitioner
Pro Se

I N D E X

	PAGE NO.
Opinions Below----------	2
Jurisdiction----------	2
Questions Presented----------	5
Constitutional Provisions and Federal Rules Involved-------	9
Statement----------	9
Reasons for Granting Writ----	24
Conclusion----------	36
Appendix A----------	38
Appendix B----------	41
Appendix C----------	43
Appendix D----------	44
Appendix E----------	44
Appendix F----------	45
Appendix G----------	45

AUTHORITIES

Cases:

Arena vs. Luckenbach Steamship Company, 279 Fed. Rep. (2d) 186----------	34
Deming vs. Turner, D.C. 63 F. Supp. 220----------	31
Ericson vs. Slomer, 94 F. 2d 437, 439----------	31

INDEX Continued

PAGE NO.

National Millwork Corp. vs Preferred Mut. Fire Ins. Co. 28 Fed. Supp 952, S.D., N.Y. 1939---------- 34

Nieman vs. Bethlehem Natl. Bank, 32 Fed. Supp. 437------ 33

Publicker vs. Shallcross, CCA 3rd 106 F. 2nd 949, 126 A.L.S. 386, Writ of Cert. Den. 308 U.S. 624, 84 L. Ed. 521 50 Sup. Ct. 379---------- 32

Cedillo vs. Standard Oil Co. 261 F. 2nd 443---------- 31

Constitutional Provision and Federal Rules

Pertinent Provision, 5th Amendment to United States Constitution---------- Appendix 44

Federal Rules of Civil Procedure

15(a), 8(d), 28 U.S.C.A.-- 9
12(b), 28 U.S.C.A.-------- 18
Rule 8(b)---------- 21, 22
35(a) C.J.S.,Sec. 346----- 30, 31
Rule 8(d)---------- 32

Pleading, Text Books

41 Am.Jr.Sec. 198--------- 32
71 C.J.S.,Sec. 155-------- 32
71 C.J.S.(b), Sec. 523---- 32,33
71 C.J.S., Sec. 321------- 30,35

Barron & Holtzoff--------- 30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO.

HUGH C. FISHER,

Petitioner

v.

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS for the FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 15, 1966.

OPINIONS BELOW

The verbal opinion of District Court for the Northern District of Texas on defendant's verbal motion to dismiss plaintiff's case is unreported. (See Statement of Facts R. pps.30-39 and formal written Order or Judgment dismissing case was entered February 1, 1965.)

The opinion of the Court of Appeals for the Fifth Circuit is reported at 359 F.2d 59 (Appendix A infra pps.38-39)

JURISDICTION

The judgment of Court of Appeals for the Fifth Circuit was made and entered on April 15, 1966. (R. p. 48) and copy thereof is appended to this Petition in the Appendix at pps. 41-42.

The jurisdiction of this Court is invoked under U.S.C. 1254 (1).

QUESTIONS PRESENTED

INTRODUCTION

The foundation of this action in compliance with which the correct Judgment should

be rendered and entered are the Pleadings, the legal effect thereof and the issues made and formed thereby for trial, all of which have been maintained, asserted and argued by your petitioner and plaintiff, almost from the time of the filing by the defendant in the District Court of its irresponsive answers to your petitioner's amended complaint as of course filed in District Court. The District Court held that the said pleadings of defendant were responsive answers to petitioner's original complaint and amended complaint as of course filed in the District Court therefore, the said answers did not in legal effect admit or cause to be admitted the allegations other than the allegations as to quantum of damage contained in your petitioner's amended complaint as of course filed in the District Court and that it was incumbent upon your petitioner and plaintiff in the District Court to prove same to make out a prima facie case.

Your petitioner and plaintiff in the District Court being of the opinion that all allegations of his amended complaint as of course, filed in the District Court, except allegations as to quantum of damage were admitted or caused to be admitted by defendants irresponsive answers filed in the District Court, refused to offer proof of said admitted allegations.

The Court then sustained defendant's "Verbal Motion" which reads as follows: "I move for judgment on the pleadings and on the testimony of the Plaintiff for the reason that the statute provides that Plaintiff show either an act of negligence by omission or commission before recovery can be allowed, and I submit that no government employee has been shown to be negligent by this Plaintiff," made, after your petitioner and plaintiff in District Court had offered his evidence in chief on the issue of Quantum of Damage on the pleadings and on plaintiff's failure to make out a prima facie case.

QUESTIONS PRESENTED

1. Did the District Court err as a matter of law in overruling your petitioner and plaintiff's motion filed in the District Court for Judgment on the pleadings to the extent as demanded and prayed for?

2. Did the District Court err as a matter of law in overruling your petitioner and plaintiff's motion filed in District Court to vacate order of District Court granting defendant leave to amend its original answer filed in said District Court?

3. Did the District Court err in not holding as a matter of law, that the only issue of fact to be tried by the said District Court, made formed and framed by the pleadings in action, is as quantum of damage and that it was only necessary for your petitioner and plaintiff to introduce proof of said issue of fact to make out a prima facie case.

4. Did the District Court err in sustaining your, defendant's, verbal motion in District Court for an involuntary dismissal of your petitioner and plaintiff's action in said District Court a final order or Judgment on the merits, on the pleadings as construed by the said District Court on the trial of said verbal motion and the failure to make out a prima facie case in that no evidence was offered by your petitioner and plaintiff in District Court except on issue of quantum of damage?

5. Did the District Court err in not holding as a matter of law, this action could not be tried by the said District Court on a Superseded original complaint filed in action and answers thereto and the irresponsive inaffective issues made, formed and framed thereby and a Judgment based thereon rendered against your petitioner and plaintiff in said District Court?

6. Did the District Court err in not holding that as a matter of law, in the trial by said Court of this action on the merits, said Court was required on rendition of Final Judgment on the merits to timely make in writing, sign and file in action Findings of Fact and Conclusions of Law?

7. Did the Court of Appeals err in failing or refusing to review, consider and decide the questions presented supra which were duly submitted?

8. Did the Court of Appeals err in failing or refusing to give or grant appellant, your petitioner, a fair, impartial, full and complete hearing and trial in this cause according to the regularly established and recognized mode of procedure,the pleadings of plaintiff, and defendant, the legal effect of said pleadings, and the issues made, formed and framed thereby as required by the law of the land and due process of law guaranteed and demanded by the Fifth Amendment of the

Constitution of the United States of America which provides without qualification that no person shall be deprived of life, liberty or property without due process of law? (See Petition for Rehearing for confirmation and amplification if necessary. Transcript of record P. 49.)

9. Did the Court of Appeals err in digressing and departing from the issues raised by the pleadings in case and considered by the District Court in sustaining defendant's verbal motion to dismiss the case and affirming the Judgment to dismiss the case on issues, not raised by pleadings and considered by the District Court?

10. Did the Court of Appeals err in regarding defendant's Motion to amend its Original answer filed in the District Court, the order of District Court granting leave to file a proposed amendment, a copy of which proposed amendment is attached to motion, which proposed amendment was in fact never filed,

or any action of Court based on said motion, as being in record, and sustaining order or Judgment in suit rendered in District Court on defendant's said verbal motion to dismiss.

CONSTITUTIONAL PROVISIONS and FEDERAL RULES INVOLVED

Fifth Amendment of Constitution of United States. (See App. p.44)

Federal Rules of Civil Procedure Nos. 15(a), 8(b), 8(d), 28 U.S.C.A. (See App.p.44)

STATEMENT

That your petitioner, plaintiff in District Court, under the Federal Tort Claims Act, 60 Stat. 842, 843; 28 U.S.C.A. Sec. 1346(b) and 2671, et seq. filed his original complaint therein on August 15th, 1963, (R.1), alleging as follows:

That defendant is the owner of the United States Post Office Building located on Coleman Street in the City of Marlin, in Falls County, Texas. Said building and the appurtenances thereto are maintained, operated and used by the defendant, its agents, employees and

servants acting within the scope of their authority and employment for the purpose, among other things, of handling generally the United States mail service, and at said location and place ingress and egress thereto and therefrom by pedestrians and invitees on business is by the use of stone steps, and which steps are on the Coleman Street side and on the front of said building; said steps are from said building to the sidewalk on Coleman Street aforesaid, and the distance from said building to the sidewalk, on which said steps are located, covers several feet.

That sometime subsequent to the construction of the steps to said building, exact date being unknown to plaintiff but known or should be known to defendant, its agents, employees and servants acting within the scope of their authority and employment, but prior to and including the date of the hereinafter alleged accident, the defendant, its agents, employees and servants, acting within the scope of their

authority and employment, for reasons best known to themselves, placed tape upon the treads of said steps, said steps being used for ascending and descending by pedestrians and invitees, and which tape so placed on the treads of said steps was unrounded or beveled on the edge facing the risers of the steps, thereby leaving said edges of tape extending upwards and vertically a distance of one-eighth (1/8th) inch, or more, above the surface of the treads but not obvious to descending pedestrians and invitees on business using ordinary and reasonable care, thereby rendering said steps and taping exceedingly and extremely dangerous and unsafe for descending pedestrians and invitees on business, particularly for those with rubber heels, on account of the likelihood of tripping on said tape and being thrown forward by the heel contacting the edge of said tape and causing the pedestrian or invitee to fall down the steps.

That said steps and taping were maintained in said dangerous and unsafe condition by defendants, its agents, employees and servants acting within the scope of their authority and employment, especially for persons wearing rubber heels, for sometime prior to the date of the hereinafter mentioned accident and for sometime thereafter; until said tape was removed from a portion of the steps where the hereinafter mentioned accident occurred, by defendant, its agents, employees and servants, acting within the scope of their authority and employment well knew or should have known.

That the conduct of defendant, its agents, employees and servants, acting within the scope of their authority and employment as set forth in paragraphs Four (4) and Five (5) hereinabove and for the reasons set forth therein, which are made a part hereof by reference, was negligence and a breach of duty owed to pedestrians and invitees on

business.

That plaintiff, a visitor in the City of Marlin, Falls County, Texas, on October 26, 1961, went to the United States Post Office Building hereinbefore mentioned, on said date, to obtain his mail, which mail had been forwarded from his address in Lubbock, Lubbock County, Texas, to "general delivery" at Marlin, Texas, aforesaid. While plaintiff was descending the steps aforesaid to the sidewalk heretofore mentioned, his heel came in contact with the deceptive edge of tape on said step, which defective, dangerous and unsafe condition of steps and tape thereon could not be observed by plaintiff through ordinary observation and reasonable care although duly exercised, especially when descending on said steps, on which he tripped and fell down said steps with terrific force to the sidewalk below. Said fall and accident was caused solely and proximately by the negligence and breach of duty set forth in paragraphs Four (4), Five (5)

and Six (6) hereinabove mentioned by the defendant, its agents, employees and servants, acting within the scope of their authority and employments, and which paragraphs Four (4), Five (5) and Six (6) are made a part hereof by reference.

That as a result of said accident, plaintiff was and is permanently injured in his lower back and hip joints, and was otherwise injured and for sometime was unable, as a result of said accident, to transact his business affairs, suffered great pain of body and mind and has incurred expense for medical attention and hospitalization, over and above the sum contributed by insurance, in the amount of $141.00.

WHEREFORE, plaintiff demands judgment against defendant in the sum of Forty-Six Thousand One Hundred Forty-One and 80/100 Dollars ($46,141.80) together with the costs and disbursements of this action.

That your petitioner, plaintiff in District Court, on August 22, 1963, filed an amended complaint as of course (R.5) amending his hereinabove mentioned original complaint which amended complaint as of course contained all the allegations of his hereinabove mentioned original complaint except paragraph 8 thereof which was amended by paragraph 8 of amended complaint as of course as follows: "was prevented for sometime after accident from transacting his business and will be prevented from transacting same in toto in the future on account of the permanency and nature of said injuries; he has suffered great pain of body and mind and will continue to do so in the future on account of the permanency and nature of his injuries."

That your defendant in District Court, on October 15, 1963, filed an answer (R10) to your petitioner and plaintiff's hereinabove mentioned Original Complaint (R. 1) as follows:

The complaint fails to state a claim upon

which relief can be granted.

The defendant, United States of America, says that Hugh C. Fisher, by his conduct upon the occasion in question, was guilty of negligence which was the sole proximate cause of the damage alleged in the complaint.

The defendant, United States of America, says that Hugh C. Fisher, by his conduct upon the occasion in question, was guilty of negligence which was a proximate cause of the damage alleged in the complaint.

With respect to the allegations in said original complaint the defendant pleads as follows:

1. The defendant admits that this action is brought under the provisions of 28 U.S.C. 1346 (b), commonly known as the Federal Tort Claims Act, as alleged in Paragraph 1 of the Complaint.

2. The defendant is without information as to the truth of the remaining allegations in the complaint and therefore denies all of

same.

That on February 17, 1964, your petitioner and plaintiff in District Court filed a motion for judgment on the pleadings for the reason that answer filed herein (R.52) shows that plaintiff is entitled to judgment as demanded in his amended complaint as of course. (R.5)

That your defendant in District Court, on February 26, 1964, filed a motion for leave to file an amendment to its answer, (R.52), as per copy of proposed amendment attached to motion, (R.53) on the grounds that justice so requires in order that all issues between the parties may be fully litigated in this action.(R.53) That the above motion, on said date that it was filed,without being set for trial, your petitioner and plaintiff in said District Court notified and given an opportunity to be heard was sustained by the Court and leave given to file an amendment as demanded. (R.54)

On March 3, 1964, your petitioner and plain-

tiff in District Court filed a Motion to Vacate Order of Court allowing an amendment to answer and dismissing said amendment to answer filed herein by authority thereof (R.55) for the following reasons, to-wit: That said Amendment to Answer is illegal and irregular in that it neither complies with Rule 15(a) nor 15(d) of Federal Rules of Civil Procedure 28 U.S.C.A.

That the defenses set forth in defendant's amendment to answer were not heretofore presented by motion nor by its original answer, although known or should have been known to defendant, and were waived under rule 12(b) Federal Rules of Civil Procedure, 28 U.S.C.A.

And that, in the absence of showing, which is the case here, of good faith, lack of knowledge, mistake, or inadvertence on part of defendant when seeking its amendment to answer, or some change of condition of which defendant had no knowledge or control, power of Court to permit defendant's amendment to

its answer will not be used to completely change theory and issues of case, which was done, after case had been submitted to Court for a hearing on another theory, which latter theory will expedite the disposal thereof, and decrease expense causing great prejudice to plaintiff.

That on April 20, 1964, Motion for Judgment on the Pleadings as hereinabove mentioned filed February 17, 1964, and Motion to Vacate Order of Court allowing amendment to answer and dismissing said amendment to answer filed herein by authority thereof, filed March 3, 1964, hereinabove mentioned,were overruled. (R. 117)

Cause was set by the District Court on November 16, 1964, for trial on the merits. The record showed on said date that the only issue to be tried on the merits was the issue as to quantum of damage. Case was duly called on aforesaid date and trial proceeds. As defendant had not filed in District Court a responsive pleading to your petitioner and plaintiff's

Amended Complaint as of course putting at issue questions of fact or law set forth therein, your petitioner and plaintiff proved the issue of record as above stated and rested. Your defendant verbally "moved for" judgment on the pleadings and on the testimony of the plaintiff for the reason that the statute provides that plaintiff show either an act of negligence by omission or commission before recovery can be allowed, and I submit that no government employee has been shown to be negligent by plaintiff.

That on February 1, 1965, the Court filed an order granting defendant's motion and dismissed plaintiff and your petitioner's action on the pleadings and on plaintiff's failure to make out a prima facie case. (R. 128)

That aforesaid order of involuntary dismissal was and is a final judgment on the merits and the District Judge failed to write, sign and file in case findings of fact and conclusions of law as required by Rules 41(b)

and 52(a) of the Federal Rules of Civil Procedure 28 U.S.C.A.

That your petitioner and plaintiff in District Court, on February 10, 1965, filed a Motion for New Trial (R. 146) in which plaintiff moves the Court to set aside judgment or order of involuntary dismissal of plaintiff's action on the merits entered therein on the 1st day of February, 1965, which judgment or order was granted on verbal motion of defendant made after conclusion of plaintiff's evidence on hearing of merits of action and after plaintiff had rested on the ground that according to the pleadings and evidence offered by plaintiff a prima facie case was not made out by a fair preponderance of the evidence as no evidence was offered to prove material facts alleged in plaintiff's Amended Complaint as of course, other than the material fact or facts relative to quantum of damage, and to grant a new trial on the following grounds, to-wit:

The Court erred in failing to make in writing, sign and file therein findings of fact and conclusions of law as required by Rules 41(b) and 52(a) of the Federal Rules of Civil Procedure, 28, U. S. C. A.

The Court erred in holding that the answer and the amendment filed by defendant in the aforementioned action were in legal effect a response to plaintiff's Amended Complaint as of course filed in the abovementioned action.

The Court erred in holding that the pleadings of defendant mentioned in Article 2 above, made a part hereof by reference, did not in legal effect admit all the material allegations of plaintiff's Amended Complaint as of course filed in the abovementioned action except material allegation relative to quantum of damages.

The Court erred in holding that plaintiff failed to offer sufficient evidence to make out a prima facie case on the merits in that he did not offer any evidence to prove material facts,

which were in legal effect, admitted by the pleadings of defendant.

The Court erred in the making, signing and entering said judgment.

On April 6, 1965, Motion for New Trial denied by District Court and judgment or order entered. No formal objection and exception was taken to the ruling of the Court by your petitioner and plaintiff, in District Court if same was necessary, in that he had no notice at any time when said motion was to be tried and disposed of and consequently was absent.

Notice of Appeal filed June 4th, 1964 as follows:

Notice is hereby given that HUGH C. FISHER, plaintiff herein, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this action on February 1st, 1965, and after Motion for New Trial timely filed having been verbally overruled on

February 11th, 1965, and written order overruling said Motion for New Trial entered on the Docket on April 6th, 1965.

Case called submitted in the Court of Appeals, Fifth Circuit, March 10,1966. (R.45)

Written opinion and Judgment rendered in said Court of Appeals and formal written Judgment entered April 15, 1966. (R. 46)

Motion of Petitioner for Rehearing was filed in said Court of Appeals, May 5, 1966 (R. 50) and Rehearing Denied May 16, 1966. (R. 54)

REASONS FOR GRANTING THE WRIT

I.

The task of this Honorable Court is to decide the questions presented supra and to decide whether according to the legal answers thereto the District Court departed from well settled principles of law as proclaimed by the Federal Rules of Civil Procedure, the decisions of all the Federal Courts on the

questions involved and the text books and whether the Court of Appeals departed from the accepted and usual course of Judicial proceedings and sanctioned such departure by the District Court so far as to call for an exercise of this Court's power of supervision.

That defendant in the District Court on October 15, 1963, apparently after due deliberation appeared in action in the District Court and chose to respond to plaintiff's amended complaint as of course filed therein on August 22, 1963 (R. 5) by filing an original answer (R. 10) to your petitioner and plaintiff's original complaint in the District Court filed August 15th, 1963 (R. 1), that the said original answer of defendant doubly admitted the allegations of your petitioner and plaintiff's abovementioned complaint as of course filed in the District Court firstly for the reason that as an irresponsive answer to petitioner and plaintiff's abovementioned amended complaint as of course it failed to

deny the allegations of said amended complaint as of course and therefore admitted or caused to be admitted all the allegations of said amended complaint as of course except the allegations relative to quantum of damage, secondly, as an irresponsive answer as aforesaid and as insufficient denial based on lack of knowledge and information to form a belief as to the truth of the allegations set forth in your petitioner and plaintiff's original complaint it further admitted or caused to be admitted all of the allegations in your petitioner and plaintiff's abovementioned amended complaint as of course when said original answer and said original complaint are filed in evidence on trial of merits.

That on account of the nature of the pleadings aforesaid in order to expedite the trial of action and lessen expense your petitioner and plaintiff in District Court, although entitled to judgment on the grounds firstly above mentioned, decided to stand on

answer of defendant as drawn and eliminate any further proceedings by defendant as to its pleadings impliedly offered to stipulate to let said defendant's irresponsive answer stand as an answer to your petitioner and plaintiff's amended complaint as of course by filing in District Court on February 17, 1964 a motion for Judgment on the pleadings (R. 12).

That on February 26, 1964 defendant filed a motion for leave to file amended pleading. (R.12) thereby impliedly refusing to accept your petitioner and plaintiff's offer to stipulate. That order granting leave to amend was filed by defendant on February 26, 1964, and said defendant was ex parte given leave to file an amendment on same date (R.14), which proposed amendment was never filed (R.13). That said non-filing through error and over-sight never came to the attention of your petitioner and plaintiff in Dis-

trict Court until after the hearing by the Court of Appeals and apparently have never been noticed by the District Court or Court of Appeals (Vide R.49). Consequently, on March 3, 1964, your petitioner and plaintiff in District Court in order to protect his rights abovementioned and particularly source of admission mentioned secondly supra by opposing the supposed amendment which was never filed as aforesaid, filed a motion to vacate order of court allowing said amendment to answer. (R.15)

That on the 20th of April, 1964 your petitioner and plaintiff's motions in the District Court for Judgment on the pleadings and motion to vacate order allowing defendant to answer filed in the District Court in this case were overruled and written order signed and entered. (R.20-21)

II.

As the foundation of this case are the pleadings, legal effect thereof and issues made, formed and framed thereby for the purpose of trial as stated supra in introduction to questions presented, according to well settled hornbook Rules of Federal Courts, and law as proclaimed by the Decisions of all the Federal Courts even the Court of Appeals of the Fifth Circuit, which have passed on the questions involved in this case, and the text books, I am citing only enough authority to freshen the Court on the subject, thereby relieving the Court of the unnecessary labor of reviewing an avalanche of cumulative authority.

As the undisputed facts relative to the nature of the pleadings of both plaintiff and defendant in the District Court are fully shown by the verbiage and filing dates thereof (R. 1,5,10,12,15) and all

questions presented supra, Nos. 1 to 6 are related and having a bearing on each other except No. 2 which is subject to action of District Court mentioned infra. I shall discuss as a whole the Federal Rules and law which, I contend will answer affirmatively all questions presented supra concerning District Court.

Your petitioner and plaintiff's amended complaint as of course (R.5), filed August 22, 1963, amended petitioner and plaintiff's original complaint (R.1)filed August 15, 1963 superseded the latter original complaint and rendered same functus officio void and no effect as a pleading and no part of the record as such. Federal Civil Procedure, 35 A.C.J.S.,Sec. 346, Effect of Amendment, and cases cited, and Barron and Holtzoff, Federal Practice and Procedure, Sec. 441, and cases cited. An amended pleading supersedes the original pleading 71 C.J.S., Sec. 321, p.716 and

cases cited. Ericson v. Slomer, 94 F. 2d 437, 439. Cedillo vs. Standard Oil Co. 216 F. 2nd 443.

A party must plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleadings, whichever period may be longer, unless the Court otherwise orders. Federal Civil Procedure 35 A C.J.S. p.348 and cases cited and Rule 15a, Federal Rules of Civil Procedure,28 U.S.C.A.

Ordinarily either an answer should be interposed to an amended complaint or a stipulation should be made that the answer to the original complaint shall stand as the answer to the amended complaint. Deming vs.Turner, D.C. 63 F.Supp.220.

Averment in a pleading to which a responsive pleading is required, other than those as to the amount of damage,are admitted when not denied in the responsive pleading. Rule 8(d), Federal Rules

of Civil Procedure, 28 U.S.C.A. and cases cited.

Admissions may arise by implication from a party's failure to plead or from failure to deny. Pleading, 41 Am.Jr. Sec. 198, p. 431. It is an elementary rule that a litigant is not required to prove the allegations of facts admitted by his adversary to be true. Pleading 41, Am. Jr. 81, Sec. 201, p. 435 and cases cited. Publicker vs. Shallcross, CCA 3rd 106 F. 2nd 949, 126 A.L.R. 386, Writ of Certiorari denied in 308 U.S. 624, 84 L.Ed. 521, 60 Supreme Court 379.

Material allegations of the complaint which are not denied nor properly denied in the answer stand admitted. Pleading 71 C.J.S., Sec. 155 page 523, and cases cited.

Material allegation of a pleading deemed admitted by failure to deny need not be proved. Pleading 71 C.J.S(b), Sec. 523, p.1082, and cases cited.

A fact essential to a cause of action or defense need not be proved if admitted by the pleadings of the adverse party. Pleading 71 C.J.S., Sec. 523, p. 1071 and cases cited.

Your petitioner-plaintiff takes the position that defendant by its original answer in District Court has answered in terms of what amounts to an admission of facts plead by plaintiff in District Court.

Under the Federal Rules of Procedure (28 U.S.C.A. 8b) it is required that if a party is <u>without knowledge or information sufficient to form a belief</u> as to the truth of an averment, he shall so state and this has the effect of a denial. (35 A Corpus Juris Secundum 446, Nieman vs. Bethlehem National Bank, 32 Fed. Supp. 437)

Where an allegation is on its face untrue as where the matter is one of common knowledge or one as to which one can inform himself with slight effort the "proforma"

denial is insufficient. (Nat. Millwork Corp. vs Preferred Mut. Fire Ins. Co. 28 Fed. Supp. 952, S.D., N.Y. 1939; Arena vs. Luckenbach Steamship Company, 279 Fed. Rep. (2d) 186; 35A, C.J.S. 446-47; Barron & Holtzoff, Federal Practice, Sec. 277, page 151).

Relative to question 2 presented supra I am of the opinion that court was in error for overruling apparently on grounds stated but was correct in doing so on ground that even if any amendment had been filed it was no part of the record. Pleading 71 C.J.S., Sec. 321, p. 717.

That on account of the above rules of Court and law quoted, your petitioner humbly asks that this Honorable Court decide questions presented one to five both inclusive, affirmatively, and question present No. 6 I leave to the judgment of the Court in view of the verbal opinion of the District Court quoted in Statement

of Facts in the record.

Now, as to questions No. 8, 9 and 10 presented supra, your petitioner is impelled to answer said questions affirmatively and asks this Honorable Court to do likewise. Constitution of the U.S., 5th Amendment. Authorities supra herein, cited by reference. (See. App. p.44)

And further, your petitioner is impelled to answer question presented No.10 supra affirmatively and asks this Honorable Court to do likewise. Pleading 71, C.J.S., Sec. 321 p.717, which states that any motion addressed to original pleading and any ruling of Court with relation to sufficiency of pleading is not properly in record.

From the above and foregoing, it is evident that the District Court departed from well settled principles of law as proclaimed by the Federal Rules of Civil Procedure, the decisions of all the Federal

Courts, on the questions involved, and the text books and that the Court of Appeals departed from the accepted and usual course of Judicial Proceedings and so far sanctioned such a departure by the District Court as to call for an exercise of this Honorable Court's power of supervision.
(Vide Rule 19, of this Honorable Court.)

CONCLUSION

For the reasons set forth above, it is respectfully submitted:

That the petition for a writ of certiorari should be granted and that on account of the palbably inexcusable action of both lower courts causing unnecessary delay and expense to your petitioner and will continue to do so unless restrained by this Honorable Court and the Judgment of the Court of Appeals affirming the Judgment of the District Court be summarily reversed at the same time that Writ is granted, case remanded to District Court

with instructions that the Status quo of case prior to dismissal by the District Court be restored and that trial of case proceed in order that defendant can offer its evidence if it so desires and your petitioner, plaintiff in District Court offer any rebuttal evidence if he so desires and that case be tried before another District Judge and case properly tried and disposed of, or in the alternative, your petitioner humbly prays that he may be granted any other relief that the Court may deem appropriate to aid him in the premises. But, if the case is remanded to the Court of Appeals, petitioner prays that it be heard before other Judges.

Hugh C. Fisher
Petitioner, Pro Se

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 22737

HUGH C. FISHER,
Appellant

versus

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court
for the Northern District of Texas

(April 15,1966)

Before GEWIN and THORNBERRY, Circuit Judges,
and WEST, District Judge

PER CURIAM: This is an appeal from an order of the United States District Court for the Northern District of Texas dismissing appellant's suit on the pleadings and for failure to make out a prima facie case. The suit was brought pursuant to the Federal Tort Claims Act, 28 U.S.C.A.

§1346(b), to recover damages for personal injuries allegedly sustained in a fall on the steps of a United States Post Office due to the alleged negligence of the United States in maintaining the building and premises.

The main thrust of appellant's argument is that the cause should be remanded because the District Court abused its discretion by allowing the Government to amend its answer to the complaint pursuant to Rule 15, F.R.Civ.P. The appellant argues that without the amendment to the Government's answer the only issue to be decided was the amount of damages. Accordingly, in the trial court appellant insisted that the amended answer was improper and he refused to offer proof necessary to establish liability. We have carefully reviewed the record and briefs and find that the District Court did not abuse its discretion in granting the Motion to Amend,

and that the court was amply justified in dismissing the case because of the refusal of the appellant to recognize the validity of the amended answer and his failure or refusal to offer proof of liability. See Lone Star Motor Import, Inc. v. Citroen Cars Corp.,288 F.2d 69 (5 Cir.1961).

The judgment is AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1965

NO. 22737

D.C. Docket No. 5-63-51-Civil Action

HUGH C. FISHER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before GEWIN and THORNBERRY, Circuit Judges, and WEST, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the

record and briefs on file for appellant, and was argued by counsel for appellee;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 15, 1966

Issued as Mandate:
May 25, 1966

APPENDIX "C"

[590b] - Gewin

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 22,737

HUGH C. FISHER,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court for the Northern District of Texas

---

(May 16, 1966)

ON PETITION FOR REHEARING

Before GEWIN and THORNBERRY, Circuit Judges, and WEST, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

APPENDIX"D"

Pertinent Constitutional provision of 5th Amendment of U.S. Constitution as follows, to-wit:

"that no person shall be deprived of life, liberty or property without due process of law."

APPENDIX "E"

Rule 15(a) F.R.C.P., 28 U.S.C.A., as follows, to-wit:

A party must plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer, unless the Court otherwise orders.

APPENDIX "F"

Rule 9(d) F.R.C.P., 28 U.S.C.A. as follows, to-wit:

Averment in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.

APPENDIX "G"

Rule 8(b) F.R.C.P., 28 U.S.C.A. as follows, to-wit:

If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 444

HUGH C. FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

1. Petitioner brought this action under the Federal Tort Claims Act (28 U.S.C. 1346(b), 2671 *et seq.*), on August 15, 1963, alleging that negligent maintenance of the steps of the United States Post Office in Marlin, Texas, had caused him to slip and fall, with resulting bodily injury. He amended his complaint as a matter of course on August 22, 1963, repeating the same factual allegations, but stating that because of his injuries he would be permanently unable to transact his business. The United States

filed a timely answer on October 15, 1963, alleging contributory negligence, and also that it was without knowledge as to the allegations in the complaint (aside from jurisdiction) and hence denied them. On February 17, 1964, petitioner moved for judgment on the pleadings, or, in the alternative, to strike the government's answer. Prior to trial, the United States, on February 26, 1964, having completed its own investigation into the facts of the case, filed a motion for leave to amend the answer. The court, determining "that justice requires such leave be given", granted the request. The amended answer specifically denied negligence on the part of the United States. Petitioner then moved the court to vacate its order allowing the amended answer, and to dismiss the amended answer. On April 20, 1964, the court denied all of petitioner's pending motions.

At trial, petitioner introduced no evidence bearing on liability. After he rested, the United States moved for dismissal on the pleadings and on petitioner's failure to make out a *prima facie* case. This motion was granted, and an order was entered dismissing the action. Petitioner's appeal to the Fifth Circuit was dismissed *per curiam*, 359 F. 2d 59. That disposition, we submit, was clearly appropriate.

2. As we understand the petition, it raises three main issues: (1) that the district court had no authority to grant the United States leave to amend its answer and the original answer thereby left standing was legally insufficient, so that the allegations in plaintiff's complaint (except with respect to damages) must be taken as true; (2) that the district court

did not file separate findings of fact and conclusions of law as required by the Federal Rules of Civil Procedure; (3) that the Court of Appeals deprived petitioner of due process by disposing of the case in a brief *per curiam* decision which did not discuss the contentions raised in petitioner's brief.

a. The district court clearly had authority under the Federal Rules to permit the United States to file an amended answer.[1] Rule 15(a) expressly provides that when leave of court to amend is sought "* * * leave shall be freely given when justice so requires," and that amendments are to be liberally allowed. See, *e.g.*, *Foman* v. *Davis*, 371 U.S. 178; *Huse* v. *Consolidated Freightways*, 227 F. 2d 425 (C.A. 7); *Lone Star Motor Import, Inc.* v. *Citroen Cars Corporation*, 288 F. 2d 69 (C.A. 5).[2]

---

[1] Petitioner now argues that the amended answer was never filed (Pet. 27). However, the amended answer was filed in the district court (R. 13) pursuant to the order of that court, and the docket entries reflect that it was filed on March 2, 1964.

[2] Since the motion to amend was properly granted, it is not necessary to consider petitioner's argument that the effect of the United States' original answer was to admit liability on the part of the government. However, Rule 8(b) clearly provides that the statement that a defendant is "without knowledge or information sufficient to form a belief * * * has the effect of a denial." There is nothing improper in the government's answering in such a manner when it has not yet completed an investigation of the circumstances of the complaint.

Similarly, since the motion to amend was properly granted, petitioner's argument that the United States' original answer was irresponsive (and therefore insufficient) since allegedly directed against petitioner's original complaint, and not his amended complaint, is without merit. As noted *supra*, peti-

b. Petitioner's contention that the court failed to make separate findings of fact and conclusions of law pursuant to Rules 41(b) and 52(a) is without foundation. In its order dismissing the action, the district court ruled that plaintiff had failed to make out a *prima facie* case and concluded that the action should be dismissed (R. 22). Since petitioner introduced no evidence at all on the issue of liability, the action was not one "tried upon the facts." Rule 52(a). The district court's order adequately reflected the basis of its decision, and the making of formal findings and conclusions was neither feasible nor necessary.

c. Finally, there is no basis for petitioner's contention that he was deprived of due process by the manner in which the Fifth Circuit disposed of his appeal. An appellate court need not mention specifically in its opinion every contention raised by a party.

We respectfully submit that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

SEPTEMBER 1966

---

tioner's amended complaint repeated the same factual allegations which were stated in his original complaint. A denial for want of knowledge in an answer timely filed by the United States, however directed, is plainly sufficient and does not result in an admission of such allegations.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 231148 208